such licenses, and imposing penalties for not taking out and paying for them, are not contrary to the Constitution or to public policy.

4. That the provisions in the act of 1866 for the imposing of special taxes, in lieu of requiring payment for licenses, removes whatever ambiguity existed in the previous laws, and are in harmony with the Constitution and public policy.

5. That the recognition by the acts of Congress of the power and right of the States to tax, control, or regulate any business carried on within its limits, is entirely consistent with an intention on the part of Congress to tax such business for National purposes.

It follows: That in the case from the Northern District of New York, the question certified must be answered in the affirmative.

That in the five cases from the District of New Jersey, the several judgments must be reversed, and the several causes remanded to the Circuit Court for new trial, in conformity with this opinion.

That in the case from the District of Massachusetts, the two questions certified must be answered in the affirmative; and—

That in each of the two cases from the Southern District of New York, the following answer must be returned to the Circuit Court, namely: "That the law imposing the special tax in the indictment mentioned, and for the non-payment of which, said indictment was preferred and found, is valid, and not unconstitutional."

ALL WHICH IS ORDERED ACCORDINGLY.

PERVEAR *v.* THE COMMONWEALTH.

1. A license from the Federal government, under the internal revenue acts of Congress, is no bar to an indictment under a State law prohibiting the sale of intoxicating liquors. The *License Tax Cases*, *supra*, p. 462, herein affirmed.
2. A law of a State taxing or prohibiting a business already taxed by Con-

gress, as *ex. gr.*, the keeping and sale of intoxicating liquors,—Congress having declared that its imposition of a tax should not be taken to abridge the power of the State to tax or prohibit the licensed business,—is not unconstitutional.

3 The provision in the 8th article of the amendments to the Constitution, that "excessive fines" shall not be "imposed, nor cruel and unusual punishments inflicted," applies to National not to State legislation; the court observing, however, that if this were otherwise, a fine of $50 and imprisonment at hard labor in the house of correction, during three months—the punishment imposed by a State for violating one of its statutes, forbidding the keeping and sale of intoxicating liquors—cannot be regarded as excessive, cruel, or unusual.

THIS cause was brought before the court by writ of error to the Supreme Court of the Commonwealth of Massachusetts, under the 25th section of the Judiciary Act.

Pervear, the plaintiff in error, was indicted in the State court for keeping and maintaining without license a tenement for the illegal sale and illegal keeping of intoxicating liquors.

In bar of this indictment he pleaded specially three matters of defence:

(1) That he had a license from the United States under the internal revenue acts of Congress to do all the acts for which he was indicted:

(2) That he had paid a tax or duty on the intoxicating liquors, for keeping and selling which the indictment was found, in the same packages, and in the same form and quantity in which he sold the same; and

(3) That the fine and punishment imposed and inflicted by the law of Massachusetts for the acts charged in the indictment were cruel, excessive, and unusual, and that the State law was therefore in conflict with the Constitution of the United States [the 8th article to the amendments of which, proposed in 1789, declares that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted].

This plea was overruled, and Pervear declining to plead further, a plea of not guilty was entered for him. He was then put on trial, and the court instructed the jury that the

plea was no defence to the indictment; to which instruction exception was taken. A verdict of guilty was thereupon found, and Pervear was sentenced to pay a fine of fifty dollars and to be confined at hard labor, in the house of correction, for three months.

The writ of error brought this sentence under review, and the general question now was, Did the State court err in instructing the jury that the plea was no defence to the indictment?

Mr. Sennott for Pervear, plaintiff in error:

I. Congress, in the exercise of its power to lay and collect taxes, duties, imposts, &c., has constantly taxed *imported articles*. Such articles, so taxed, have been protected from State interference by this court because they were taxed by Congress to raise revenue. The same body, in its internal revenue acts, has of late taxed domestic spirits and beer by measure, for the purpose of raising a revenue.

Now, if the payment of the first impost protects imported brandy from State laws, why does not the payment of the second impost protect the plaintiff's domestic spirits and beer?

In *Brown* v. *Maryland*,* Chief Justice Marshall declares that, "by the payment of the duty to the United States, the importer *purchases a right* to sell his merchandise, a State law to the contrary notwithstanding." If this be true, the plaintiff, by paying *his* duty, purchased a similar right to sell his goods, notwithstanding a State law.

II. The end of government is the protection of the persons and the property of men, and not to enforce morality or to teach religion, or to carry on farming, or the lumber trade, or to monopolize the liquor traffic. Laws passed by government, which it has no right to pass, are not laws. Punishments inflicted in pursuance of them are illegally inflicted.

The punishment, in this case, being for doing a lawful

* 12 Wheaton, 419.

act, was excessive, cruel, and unusual, and therefore against the eighth amendment of 1789.

Mr. Reed, Attorney-General of Massachusetts, contra:

The only distinction which it can be pretended exists between *McGuire* v. *Commonwealth** and *The License Tax Cases*,† already decided by this court, and the case now under consideration is, that in the present case the tax paid was upon the articles sold instead of upon the business carried on. But the distinction is not one of essence, and, notwithstanding it, the rule established in the cases cited must apply.

The CHIEF JUSTICE, after stating the case as already given, delivered the opinion of the court.

We have already decided at this term that the first proposition of the plea in this case is no bar to an indictment under a State law taxing or prohibiting the sale of intoxicating liquors

The second proposition of the plea is nothing more than a different form of the first. Both are identical in substance.

The case of *Brown* v. *Maryland* was referred to in argument as an authority for the general proposition that the sale of goods in the same packages on which a duty had been paid to the United States cannot be prohibited by State legislation. But this case does not sustain the proposition in support of which it is cited.

The discussion in *Brown* v. *Maryland* related wholly to imports under National legislation concerning commerce with foreign nations. A law of Maryland required importers of foreign goods to take out and pay for a State license for the sale of such goods in that State; and under this law the members of a Baltimore firm were indicted for having sold certain goods in packages as imported, without having taken out the required license. The defence was that the duty on the goods, imposed by the act of Congress, had been paid to the United States; that the license tax was, in

* 3 Wallace, 388. † *Supra*, last preceding case, p. 462.

effect, an additional import duty, which could not be constitutionally imposed by State law.

This court sustained the defence then set up. It held that, by the terms of the Constitution, the power to impose duties on imports was exclusive in Congress; and that the law of Maryland was in conflict with the act of Congress on the same subject, and was therefore void.

But the defence set up in the case before us is a very different one. It is not founded on any exclusive power of Congress, nor any act of Congress in conflict with State law. It is founded on the general power to levy and collect taxes, admitted on all hands to be concurrent only with the same general power in the State governments; and upon an act of Congress imposing a tax in the form of duty on licenses, but expressly declaring that the imposing such a tax shall not be taken to abridge the power of the State to tax or prohibit the licensed business.

The defence rests, then, in this part, on the simple proposition that a law of a State taxing or prohibiting business already taxed by Congress is unconstitutional. And that proposition is identical in substance and effect with the first proposition of the plea, and has been held in the *License Tax Cases** to be no bar to the indictment.

The circumstance that the State prohibition applies to merchandise in original packages is wholly immaterial. Even in the case of importation, that circumstance is only available to the importer. Merchandise in original packages, once sold by the importer, is taxable as other property. But in the case before us there was no importation. So far as appears the liquors were home-made, or, if not, were in second hands. And the sale of such liquors within a State is subject exclusively to State control.†

The third proposition of the plea is that fines and penalties imposed and inflicted by the State law for offences charged in the indictment are excessive, cruel, and unusual.

Of this proposition it is enough to say that the article of

* *Supra*, last preceding case, p. 462. † License Cases, 5 Howard, 504.

the Constitution relied upon in support of it does not apply to State but to National legislation.*

But if this were otherwise the defence could not avail the plaintiff in error. The offence charged was the keeping and maintaining, without license, a tenement for the illegal sale and illegal keeping of intoxicating liquors. The plea does not set out the statute imposing fines and penalties for the offence. But it appears from the record that the fine and punishment in the case before us was fifty dollars and imprisonment at hard labor in the house of correction for three months. We perceive nothing excessive, or cruel, or unusual in this. The object of the law was to protect the community against the manifold evils of intemperance. The mode adopted, of prohibiting under penalties the sale and keeping for sale of intoxicating liquors, without license, is the usual mode adopted in many, perhaps, all of the States. It is wholly within the discretion of State legislatures. We see nothing in the record, nor has anything been read to us from the statutes of the State which warrants us in saying that the laws of Massachusetts having application to this case are in conflict with the Constitution of the United States.

The judgment of the Supreme Court of the Commonwealth must be

AFFIRMED.

NOTE.

The same order was made in four other cases,† "presenting," as the Chief Justice said, "substantially the same facts and governed by the same principles."

At a later day of the term, to wit, April 30th, 1867, several other cases on this same subject, coming here in error to the Supreme Court of Iowa,‡ were submitted to the court on the rec-

* Barron *v.* Baltimore, 7 Peters, 243.

† Lynde *v.* The Commonwealth of Massachusetts; Salmon *v.* Same; Cass *v.* Same; Armstrong *v.* Same.

‡ Carney *v.* State of Iowa; Munzenmainer *v.* Same; Bachman *v.* Same; Bahlor *v.* Same; Newman *v.* Same; Stutz *v.* Same; Bennett *v.* Same.

ords and briefs of *Mr. Riddle, for the plaintiffs in error, and Mr. Cooley, contra.*

On the following 7th of May the CHIEF JUSTICE delivered the opinion of the court, that the cases resembled, in all essential features, cases already decided at this term, which presented the question of the constitutionality of State laws prohibiting, restraining, or taxing the business of selling liquors under the internal revenue licenses of the United States; that the brief of the learned counsel for the plaintiff in error calling upon the court to review its decisions affirming the validity of those laws, the court had done so, and was satisfied with the conclusions already announced.

The several judgments of the Supreme Court of the State of Iowa were therefore

AFFIRMED.

THE EDDY.

1. Contracts of affreightment are maritime contracts over which the courts of admiralty have jurisdiction. Either party may enforce his lien by a proceeding *in rem* in the District Court.
2. In the absence of an agreement to the contrary, the shipowner has a lien upon the cargo for the freight, and may retain the goods after the arrival of the ship at the port of destination until the payment is made. The master cannot, however, detain the goods on board the vessel. He must deliver them.
3. An actual discharge of the goods at the warehouse of the consignee is not required to constitute delivery. It is enough that the master discharge the goods upon the wharf, giving due and reasonable notice to the consignee of the fact.
4. Where the goods, after being so discharged and separated into their different consignments, are not accepted by the consignee or owner, the carrier discharges himself from liability on his contract of affreightments by storing them in a place of safety and notifying to the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges.
5. A frequent and even general but not at all universal practice in a particular port, of shipowners to allow goods brought on their vessels to be transported to the warehouse of the consignee and there inspected before freight is paid, is not such a "custom" as will displace the ordinary maritime right to demand freight on the delivery of the goods on the wharf.